From the Local News to Anderson Cooper: Media Strategies in High Profile Cases. -Pamela Mass and John Clune

Rule 3.6: Trial Publicity

ABA

*Advocate*

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Understanding the limitations of the Litigation Privilege

### Understanding Litigation Privilege?

While the precise extent of litigation privilege may be indeterminate, a number of cases lay a foundation establishing the privilege's scope. Litigation privilege is *an absolute* privilege yielding complete immunity from defamation allegations, and therefore the classification of communications that may be protected by litigation privilege is necessarily *narrow.* Litigation privilege generally only extends to defamatory communications involving litigants or other participants in a trial authorized by law. 53 C.J.S *Libel & Slander* §72 at 132 (1987). **The defamatory communications must be made during or prior to a judicial proceeding and have some connection or logical relation to that proceeding. *Id.*** Litigation privilege extends to out-of-court communications between opposing counsel, between attorneys and their clients, and between attorneys representing different plaintiffs in lawsuits against the same defendant.

Top Tips of dealing with media:

1. Know your client’s wishes! Never speak with the media on a case unless it is in furtherance of your client’s best wishes.
2. Know your purpose. Media for the general purpose of putting pressure on another party is generally a bad idea.
3. Understanding the reporter and their needs. Who are these people and what do they really want from us?
4. Not calling the media back is a recipe for bad coverage. Feeding the beast
5. Press conferences vs Twitter
6. Strategic Placement of accurate stories especially at the start of a case.
7. Who are the essential media outlets you need to take care of? National? AP? Local paper?
8. Prepare your best quote.
9. On and off the record and background -get explanation in plain language -off the record and background are agreements. Don’t send an email entitled “off the record” and expect something.
10. Use of written statements or emails?
11. Don’t “no comment” unless you are intending to imply you are avoiding a question
12. Be a real person. Relax.
13. Use Simple language